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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 255

UNITED STATES,
Petitioner

vs.

DON GILMORE AND SUE GILMORE,
Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Respondents Don Gilmore and Sue Gilmore respectfully request that the petition for a writ of certiorari be denied because of the following facts, authorities and reasons:

Respondents' deduction of 80% of the legal expenses in issue is amply supported by these facts found by the Court of Claims:

> "The evidence, particularly the facts set forth in finding 23, establishes that 80 percent or more of the amounts which Don Gilmore paid to his attorneys and his accountant in 1953 and to his

attorneys in 1954 were for services rendered by them to defeat Dixie Gilmore's claims to one-half of the value of the increase of his stock in the three dealership corporations, and to establish that no portion of such stock was community property." (Finding 30; Petition pp. 35, 36)

"If Dixie Gilmore had succeeded in obtaining the community interest she claimed in the stock of the automobile corporations and the dealership contracts held by Don Gilmore had been canceled because of his failure to maintain the minimum ownership of capital required by such contracts, he would have lost his positions and salaries as an officer of the corporations and, as stated in finding 14, he was too old at the time to get a similar position with other automobile dealers." (Finding 29, second paragraph; Petition p. 35)

The Court of Claims stated in its opinion (Petition p. 19): "There can be little doubt that Dixie Gilmore sought more than a divorce. * * * Dixie Gilmore wanted a substantial part of the income-producing property of plaintiff." The court below also said (Petition p. 18): "Thus, plaintiff was fighting not only to protect his income-producing property, but to prevent the loss of his salary as well."

Respondents believe that *Lykes v. United States* (1951) 343 U.S. 118, and *Lewis v. Commissioner* (1958) 253 F. 2d 821, are not authoritative here because of the wide differences in the facts. *Lykes* denied a deduction for legal expenses for services in contesting an imposition of gift taxes. Congress has changed the rule in *Lykes* by statute permitting the deduction.

Internal Revenue Code of 1954, Sec. 212(3); 26 U.S.C. 1958 ed., Sec. 212.

Lewis (p. 824) denied a deduction for legal expenses for services (action for legal separation) in respect to "the form and amount of the maintenance and support provisions to be made for petitioner's wife and adjustment of their respective property rights." *Lewis* disapproved (p. 826) of *Baer v. Commissioner*, (1952) 8 Cir., 196 F. 2d 646, because in *Baer* "the sole issue was the form and the amount of alimony to be paid to the taxpayer's wife."

No one questions that legal expenses are not deductible per se for services in resisting demands for alimony, maintenance and support. In *Gilmore* the disputed expenses were not for services in respect to "the form and amount of the maintenance and support provisions to be made for [his] wife and adjustment of their respective property rights" or "* * * the form and the amount of alimony to be paid to [his] wife", as in *Lewis* and in *Baer*. Therefore if there seemed to be a conflict between *Lewis* and *Baer*, *Lewis* not involve *Gilmore*. However, there actually is no conflict in the rule of law between *Lewis* and *Baer*. The court in *Lewis* declined to follow *Baer* on the basis of that court's construction of the facts.

The Court of Claims below did not find it necessary to choose and did not choose between *Lykes* and *Lewis* on the one hand and *Baer* on the other hand. The court recognized that so far as *Gilmore* was concerned the factual differences between the two lines

of cases mentioned made a choice unnecessary. The court below, however, did decide that the facts in *Gilmore* came under the rule of law enunciated in the cases which follow *Baer* (Petition p. 18f, viz.: Although "generally attorneys' fees in a suit for divorce * * * are not deductible" (Reg. 118, Sec. 39.24(a)-1), however, attorneys' fees can be deducted as non-trade or non-business expenses when incurred for the conservation or maintenance of property held for the production of income. (See. Sec. 23(a)(2) Internal Revenue Code 1939)

Respondents will not quarrel with petitioner's assertions (Petition p. 7) that deductibility depends upon the "proximate cause" of the expenditures or "their immediate purpose". These tests are clearly satisfied by the findings of fact of the Court of Claims herein, particularly those findings of fact quoted above at the beginning of this brief. (Findings 29 and 30.) The findings of fact leave no doubt that "the proximate cause" and "the immediate purpose" of the expenditures in issue were not for divorce but as the court stated below, "Dixie Gilmore sought more than a divorce. * * * Dixie Gilmore wanted a substantial part of the income-producing property of plaintiff." (Petition p. 19.) It is not claimed that these findings of fact are not supported by substantial evidence in the record. There is no doubt on that score. The findings of fact must therefore control the disposition of this matter.

In view of the foregoing, it is submitted that *Gilmore* is not the vehicle to resolve the alleged conflict

in decisions. Therefore the petition of the United States should be denied in this case.

Dated, San Francisco, California,
August 7, 1961.

Respectfully submitted,
ELI FREED,
Attorney for Respondents.